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In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

REPLY BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989), which mandates timber sales from particular federal lands, establishes interim guidelines for these sales, and establishes an exclusive judicial remedy for contesting the lawfulness of the mandated timber sales:

(1) Moots portions of respondents' claims in pending federal district court actions which seek declaratory and injunctive relief on planned timber sales; and,

(2) Violates the constitutional principle of separation of powers as applied to the adjudication of these claims.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, respondents Pilchuck Audubon Society, Washington Environmental Council, Washington Native Plant Society, Portland Audubon Society, Lane County Audubon Society, Oregon Natural Resources Council, and Siuslaw Task Force were plaintiffs in the district court (W.D. Wash.) and appellants in the court of appeals. National Audubon Society was a plaintiff in the district court (W.D. Wash.) and was not a party to the appeal. Respondents Washington Contract Loggers Association and William Pickell were plaintiffs in the district court (W.D. Wash.) and appellees in the court of appeals.

Respondents Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Salem Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council were plaintiffs in the district court (D. Or.) and appellants in the court of appeals.

Respondents Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O & C Counties and Benton County were defendants-intervenors in the district court (D. Or.) and appellees in the court of appeals.

None of the parties has any parent, subsidiary or affiliated corporation except Lone Rock Timber Co., Inc., which is an affiliate of Sun Studs, Inc., and Scott Timber Co., which is an affiliate of Roseburg Forest Products Co.

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I. SECTIONS 318(b)(3) AND (b)(5) MOOTED THESE CASES FOR FISCAL YEAR 1990 BY REPLACING THE CHALLENGED AGENCY PLANS WITH NEW STATUTORY STANDARDS; SECTION (b)(6)(A) BARS ANTICIPATED CASES CHALLENGING FISCAL YEAR 1990 TIMBER SALES IMPLEMENTING THE NEW STATUTORY STANDARDS.

The separation of powers argument advanced by respondents Seattle Audubon Society ("SAS"), et al., rests on a fundamental misreading of Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 745 (1989) (hereafter "Section 318"): subsection (b)(6)(A) -- the subject of the decision under review -- ***does not apply directly to these two cases***. Rather, subsections (b)(3) and (b)(5) are the provisions which resolve these two

cases for fiscal year 1990. Subsection (b)(6)(A) was intended to address prospective cases which Congress anticipated would be filed during fiscal year 1990 after the law was passed.

Seattle Audubon Society v. Robertson, No. 89-160WD (W.D. Wash.), challenged the Forest Service spotted owl management plan set forth in the Record of Decision issued by the Chief of the Forest Service on December 8, 1988. Petition for Writ of Certiorari Appendix ("Pet. App.") 6a, 30a. In Section 318(b)(3), Congress chose "to substitute adjusted interim standards for Spotted Owl Habitat Areas for national forest lands in lieu of the spotted owl management Record of Decision (ROD) published in 1988." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 88 (1989) (Conference Report on Section 318). The enactment of these new statutory standards in place of the agency action challenged in *Seattle Audubon Society* rendered the claims in that case moot during fiscal year 1990. Brief of Respondents Northwest Forest Resource Council, et al. in Support of Petitioners at 28-32. SAS never challenged this argument in its Brief.

Similarly, *Portland Audubon Society v. Lujan*, No. 87-1160-FR (D. Or.), challenged the BLM's existing spotted owl management plan. Subsection (b)(5) moots this case for fiscal year 1990 by substituting an expanded spotted owl network for the existing BLM plan.[1]

Section (b)(6)(A) does not deal at all with the *agency plans* challenged in *Seattle Audubon Society* and *Portland Audubon*

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[1] The Conference Report's statement that the (b)(5) plan "is deemed adequate" under the laws raised in *Portland Audubon Society* provides direct support for the petitioners' argument that Section 318(b)(6)(A) falls within the category of "deeming" statutes commonly enacted by Congress. H.R. Conf. Rep. No. 264 at 88; Petitioners' Brief at 25-29.

Society. Rather, it provides legal protection to "management of areas according to subsections (b)(3) and (b)(5) of this section."

Subsection (b)(6)(A) reflects Congress' anticipation that the relentless onslaught of litigation which had produced the "desperate timber supply crisis in Washington and Oregon," 135 Cong. Rec. S12961 (daily ed. Oct. 7, 1989) (remarks of Sen. Adams), that led to Section 318 would continue during fiscal year 1990. To avoid a repeat of this litigation-induced crisis, subsection (b)(6)(A) bars anticipated new cases during fiscal year 1990 by deeming the (b)(3) and (b)(5) guidelines -- not the prior agency plans -- legally adequate under the environmental laws invoked in *Seattle Audubon Society* and *Portland Audubon Society* and, in the second sentence, by barring judicial review of the guidelines.

Since subsection (b)(6)(A) does not apply to the claims asserted in these two pending cases, there can be no separation of powers violation. The Ninth Circuit was plainly wrong in finding subsection (b)(6)(A) unconstitutional when it does not apply to the two cases in question.

Immediately following the Ninth Circuit's ruling, SAS filed individual motions challenging 16 timber sales scheduled to be sold in the waning days of fiscal year 1990. These motions were filed by SAS without amending the complaint challenging the superseded Forest Service plan. These motions specifically challenged the "management of areas according to subsection (b)(3) . . . of this section" as violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, *et seq.*, and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703, *et seq.*, "the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al. v. F. Dale Robertson . . ."

The first sentence of subsection (b)(6)(A) explicitly bars those challenges. The second sentence of subsection (b)(6)(A) precludes judicial review of those sales. *See post* at 4-7. Further, reversing the Ninth Circuit's constitutional ruling should eliminate the basis for the injunctions issued by the district court against these 16 sales.

II. THE SECOND SENTENCE OF SUBSECTION 318(b)(6)(A) BARS THE CHALLENGES TO THE 16 TIMBER SALES PERMITTED UNDER THE NINTH CIRCUIT'S RULING.

The Ninth Circuit refused to consider whether the second sentence of subsection (b)(6)(A) – prohibiting judicial review of the (b)(3) and (b)(5) guidelines -- barred SAS' efforts to challenge fiscal year 1990 timber sales, even though the decision below allowed them to file such challenges. Pet. App. 17a n.4. This was clear error. The explicit bar on judicial review of the guidelines is a jurisdictional barrier, and federal courts are required to determine their jurisdiction before proceeding to the merits of the case. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976). This is especially true when the decision on the merits involves, as here, an important issue of constitutional law. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-42 (1986). Thus, the Ninth Circuit was obligated to determine if the second sentence of subsection (b)(6)(A) bars these cases irrespective of the effect of the first sentence. If it does, then there is no constitutional infirmity to the first sentence under any circumstances.

SAS argues that the no judicial review portion of subsection (b)(6)(A) merely bars a claim that the (b)(3) and (b)(5) statutory guidelines are unlawful, and does not bar judicial review of ***agency actions*** implementing the statutory guidelines. Brief of Respondents Seattle Audubon Society, et al. ("Respondents' Brief") at 35 n.29. Thus, they argue, this sentence does not bar any challenge to an individual timber sale offered to implement the mandatory sale program established in Section 318(a). *Id.*

SAS' view of the no judicial review provision makes no sense, and fails to ascribe any meaning whatever to this sentence, contrary to the rule of statutory construction requiring courts to give effect to every word in a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Courts cannot review one statute for consistency with another statute; the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, ***only*** authorizes judicial review of ***agency action***, expressly excluding Congress from the definition of agency. 5 U.S.C. § 701(b)(1)(A). It is well settled that "[u]nlike an agency decision to pursue action which has significant potential environmental effects, a congressional decision that such an action may proceed is not subject to judicial review." *Texas Comm'n on Natural Resources v. Bergland*, 573 F.2d 201, 209 (9th Cir.), *cert. denied*, 439 U.S. 966 (1978); *Enos v. Marsh*, 769 F.2d 1363, 1375 (9th Cir. 1985). Thus, merely to read the second sentence of subsection (b)(6)(A) as prohibiting judicial review of an act of Congress -- where no such judicial review was previously available -- would be to deprive that sentence of any legal significance. This court's duty, to the contrary, is to interpret that sentence to give it some meaning. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

This duty is not fulfilled by suggesting, as does SAS, that this sentence bars a constitutional challenge to the (b)(3) and (b)(5) guidelines. No one has ever hinted that there could be any constitutional infirmity to these congressional prescriptions for management of the public lands in light of Congress' broad authority to legislate regarding public property. U.S. Const. art. IV, § 3, cl. 2; *see California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). Since there is no imaginable constitutional challenge to the spotted owl guidelines, the second sentence of subsection (b)(6)(A) cannot reasonably be viewed as intended to bar such a claim. Further, the language of this sentence bars "judicial review," the specific term used in the APA for review of agency action, not acts of Congress.

Thus, to give some actual meaning to this sentence, it is necessary to interpret it as barring judicial review of some form of agency action. This interpretation must also be consistent with the explicit grant of judicial review for individual timber sales set out in Section 318(g)(1).

The only plausible interpretation of the second sentence of subsection (b)(6)(A) is that it bars judicial review of timber sales offered in compliance with the (b)(3) Forest Service guidelines based on a claim that the guidelines (1) fail to maintain a viable population of spotted owls as required under the Forest Service's NFMA regulations, 36 C.F.R. § 219.19 (1991), (2) allow unlawful taking of spotted owls under the MBTA or (3) were not preceded by a legally adequate environmental impact statement under NEPA analyzing the effect of the sales on spotted owls.[2] These were the three claims asserted in *Seattle Audubon Society* against the prior Forest Service management plan. There are no other claims which this sentence could reasonably be interpreted as barring, and to give that sentence effect it must be construed to bar these claims. Yet these are the precise claims on which Judge Dwyer enjoined the 16 timber sales following the Ninth Circuit ruling.

The Fifth Circuit's decision in *Texas Comm'n on Natural Resources v. Bergland*, 573 F.2d 201, barred judicial review in circumstances strikingly similar to those presented here. In that case, a lawsuit had produced a preliminary injunction against the practice of clearcutting in the national forests of Texas. *Id.* at 206, 209 n.7. Congress responded to the preliminary injunction and to an injunction in another case by enacting the NFMA to govern future timber harvesting practices. For a two-year period while the Forest Service was developing a new management plan, Congress enacted interim statutory authori-

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[2] Likewise BLM sales could not be challenged on spotted owl grounds under the laws invoked in *Portland Audubon Society*. No such sales were in fact challenged during fiscal year 1990.

zation for clearcutting to continue (known as the "Church guidelines"). *Id.* at 209-10. The Texas litigants sought to block implementation of the Church guidelines not by a direct attack on the congressional enactment but through an indirect attack on individual timber sales based on alleged noncompliance with NEPA. Although the court held that the Forest Service was subject to NEPA, it nonetheless held that enactment of the Church guidelines barred the courts from interfering with agency implementation of the statutory directive. *Id.* at 210.

In this case, Congress made the preclusion of judicial review -- both direct *and* indirect -- explicit rather than implicit as it was in *Texas Comm'n on Natural Resources*. The express language of the last sentence of section (b)(6) compels this court to find that Congress has precluded judicial review for fiscal year 1990 of agency action which implements the statutory spotted owl guidelines.

Thus, since the second sentence of (b)(6)(A) bars the challenges to timber sales permitted by the Ninth Circuit and upheld thereafter by Judge Dwyer, it was unnecessary for the Ninth Circuit to reach the separation of powers issue presented by the first sentence of subsection (b)(6)(A). This court can and should resolve this case through interpretation of subsections (b)(3), (b)(5) and the second sentence of subsection (b)(6)(A) without ever reaching the constitutional question wrongly decided by the court below.

III. SAS DOES NOT EVEN ATTEMPT TO DEFEND THE NINTH CIRCUIT'S RULING THAT AN APPROPRIATIONS MEASURE MAY NOT IMPLICITLY REPEAL ANOTHER STATUTE.

The Ninth Circuit recognized that subsection (b)(6)(A) would be constitutional if it implicitly repealed the environmental statutes on which claims were based in *Seattle Audubon Society* and *Portland Audubon Society*. Pet. App. at 16a. However, it ruled that it was barred from applying "a saving

interpretation of section (b)(6)(A)" because Congress cannot enact an implied partial repeal of a statute in an appropriations measure. *Id.* This ruling is directly contrary to this court's decision in *United States v. Will*, 449 U.S. 200 (1980), in which this court specifically upheld an implied repeal of a statute enacted in an appropriations measure. *Id.* at 222-23. *Will* followed a century-long line of cases upholding appropriations acts containing implied repeals of statutes. *United States v. Dickerson*, 310 U.S. 554, 562 (1940); *Mathews v. United States*, 123 U.S. 182, 186 (1887); *United States v. Mitchell*, 109 U.S. 146, 149-50 (1883).

Significantly, SAS does not even attempt to defend the Ninth Circuit's erroneous rule of constitutional analysis. It concedes that an appropriations measure may implicitly repeal an earlier statute if Congress' intent to do so is clearly manifested. Respondent's Brief at 36-37 n.30.

The Ninth Circuit's contention that its analytical principle followed this court's ruling in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), Pet. App. at 16A, is in error. *Hill* merely holds that the act of appropriating funds for a project, with no statutory language whatever, did not repeal the application of another statute to the project in question. *Id.* at 189. Indeed, the *Hill* court agreed that Congress ***could*** repeal a substantive law by implication in an appropriations act, but held that it had not done so in that case. *Id.* at 190-93. Here, where Congress enacted detailed substantive legislation, the fact that the legislation is found in an appropriations measure does not bar the legislation from implicitly repealing other statutes.

IV. SECTION 318 AMENDS OR REPEALS OTHER ENVIRONMENTAL STATUTES TO THE EXTENT NECESSARY TO ACHIEVE THE GOALS OF THE STATUTE.

Since SAS concedes that Section 318 ***could*** operate as an implied repeal of other environmental statutes if Congress

intended it to do so, it is forced to argue that Congress did not intend Section 318 to repeal or amend any other environmental law. The linchpin of its argument is that Congress intended all of the existing environmental laws to continue to apply in full to Forest Service and BLM management activities during fiscal year 1990 and intended Section 318's special measures to operate merely as one more overlay of regulation on top of the existing laws. Respondents' Brief at 41-43.

This argument is preposterous. SAS is contending that Congress really intended Section 318 to have no effect at all, to fail to achieve its intended purposes, and to leave in place the litigation-induced timber supply crisis that prompted the legislation in the first place. No reasonable court could possibly ascribe such a bizarre intention to Congress, and SAS' argument must be rejected.

A. Congress intended Section 318 to resolve the timber supply crisis in Washington and Oregon for fiscal year 1990.

Section 318 was no dead-of-night appropriations rider enacted in secrecy, as SAS contends. Rather, it was a thoughtful and reasoned congressional response to a highly publicized regional crisis in the Pacific Northwest which had been occurring for some six months by the time Section 318 was passed.

The congressional debate on the floor of both houses of Congress clearly described the open process leading to the enactment of Section 318. As Senator Adams stated:

> The controversy over efforts to protect the spotted owl and its habitat has produced one of the most painful dilemmas the Northwest has ever faced.
>
> The timber provision of this bill was developed in response to the desperate

timber supply crisis in Washington and Oregon resulting from this situation. This supply crisis arose as a result of preliminary injunctions and environmental lawsuits, which tied up a large portion of our region's timber supply in court during the past year.

. . . .

Unfortunately, the severity of the crisis this year did not give us the luxury of time to slowly mull over this issue. Mills were shutting down. Jobs were threatened and gone. Our State was being torn apart, and tensions were rising with the very real potential of violence.

We in the Northwest delegations waited and waited, as negotiations stopped and started. We waited as lawsuits were filed and injunctions were established. We waited as the agencies attempted to address the problems, without success. Deadlines were set and passed. By this summer, the summer of 1989, we realized that immediate action was required and the last stop left was the appropriation process. Nothing had been done in the authorizing committees; nothing had been done on the House side, and this was the last chance.

In July, Senator HATFIELD and I reluctantly decided to grasp the thorn and include a provision in the Interior appropriations bill. I am grateful to the members of that committee, to the chairman and my colleagues in the

> Senate for their patience and assistance in helping design this provision.
>
> The amendment was introduced with the members of the Oregon and the Washington delegations, all of them supporting the process.

135 Cong. Rec. S12961 (daily ed. Oct. 7, 1989) (remarks of Sen. Adams).

Senator Hatfield also agreed:

> Senator ADAMS of Washington State, and I met frequently with our individual colleagues, and certainly the total delegations from Washington State and Oregon met on a number of occasions to work out the Senate position. It included the support of Governor Neil Goldschmidt, of Oregon, and Governor Boothe *[sic]* Gardner, Washington State, as well. So when Senator ADAMS and I offered this in Appropriations Committee, it was really representative of a broad range of people, including all eight House Members and both Senators from Washington State, all five House Members and both Senators from the Oregon delegation and that, of course, included the Democrats as well as the Republicans, a bipartisan effort.

135 Cong. Rec. S12959 (daily ed. Oct. 7, 1989) (remarks of Sen. Hatfield).

As SAS concedes, the Senate version of Section 318 received extensive review in the House of Representatives, with

more than 100 members of Congress expressing opinions on the bill. Respondents' Brief App. B.

There is extensive legislative history stating Congress' purpose in enacting Section 318. The Conference Report on the fiscal year 1990 Interior Appropriations Act discusses the measure in detail, and 15 members of Congress discussed the statute on the floor of both houses (ten in the House of Representatives and five in the Senate). There is remarkable uniformity in this legislative history as to the purpose of Section 318: to break the litigation gridlock which had tied up the federal timber supply in the Pacific Northwest in 1989, and to restore certainty of timber supply to timber-dependent communities and businesses during fiscal year 1990.

Representative AuCoin of Oregon, a primary sponsor of the bill, stated:

> [Section 318] calls for a cease-fire in the war over the public forests of the Pacific Northwest.
>
> . . . [T]he amendment provides a 1-year breathing space for the lumber and plywood mills of Oregon and Washington which depend on national forests and BLM lands for their raw materials; it provides a 1-year reprieve for the towns and communities across Oregon and Washington whose existence depends on those mills.

135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989).

Representative DeFazio of Oregon stated:

> This agreement . . . lifts for 1 year a shadow from the timber dependent communities of

> Oregon and Washington which look to the forests for their jobs and their futures.

135 Cong. Rec. H6505 (daily ed. Oct. 3, 1989).

Representatives Dicks, Swift, Unsoeld and Wyden expressed similar sentiments. 135 Cong. Rec. H6509-10, H6531-32 (daily ed. Oct. 3, 1989).

The Senate backers of the bill fully shared these views. Senator Hatfield stated:

> . . . [T]his amendment was offered reluctantly as a 1 year, short-term, solution to the timber supply crisis that currently exists in Oregon and Washington. . . .
>
> . . . .
>
> . . . [T]his amendment provides a predictable supply of Federal timber for the region's sawmills. . . . Only through a predictable timber supply can we successfully stabilize the economies of the [timber-dependent] communities and provide economic security for the people who live in them.

135 Cong. Rec. S12979 (daily ed. Oct. 7, 1989).

Senator Gorton stated:

> The purpose of this short-term agreement is two-fold: It strives to ensure timber to mills on the brink of complete shut-down; and it strives to prevent fragmentation of significant stands of old-growth forest. In the midst of

> the Northwest timber crisis, this amendment seeks to provide short-term stability.

135 Cong. Rec. S12962 (daily ed. Oct. 7, 1989).

The Conference Report on Section 318 echoes this congressional intent:

> In developing the amendment, the managers have sought to balance the goals of ***ensuring a predictable flow of public timber for fiscal year 1990*** and protecting the northern spotted owl and significant old growth forest stands.

H. R. Conf. Rep. No. 264 at 87 (emphasis supplied).

Section 318(a) implemented this congressional intent by mandating that the Forest Service and the BLM "shall offer" the volume of timber sales specified in the law, a sharp departure from previous appropriations acts which merely provided funds for timber sales without requiring them to be offered. The language of Section 318(a) imposed on the Forest Service "a continuing duty to offer 7.7 BBF [billion board feet] of timber for sale on or before September 30, 1990 from the national forests of the states of Oregon and Washington." *Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, 1083 (D. Or. 1990); *accord Gifford Pinchot Alliance v. Butruille*, 752 F. Supp. 967, 971 (D. Or. 1990).

B. Congress intended to amend or repeal the existing environmental laws to the extent necessary to remedy the crisis created by those laws.

Congress clearly understood the legal issues in *Seattle Audubon Society* and *Portland Audubon Society*. Congress was thus well aware that the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.*, was the only environmental law applicable to spotted owls that was ***not*** the basis of any claim asserted

in either *Seattle Audubon Society* or *Portland Audubon Society*. Therefore it was unnecessary for Congress to amend the ESA to effectuate Section 318, and in enacting Section 318, Congress explicitly disclaimed any implication that it was amending the ESA. In Section 318(e) Congress specifically directed that "nothing in the statute shall affect" the interagency cooperation and consultation process with the U.S. Fish and Wildlife Service required under Section 7 of the ESA, 16 U.S.C. § 1536, or its implementing regulations.

Representative AuCoin reaffirmed this intent on the floor of the House:

> The special management habitat areas for the spotted owl are driven by the National Forest Management Act, not by the Endangered Species Act, so in this compromise as we have increased those management areas to protect the spotted owl, we are in no way touching the Endangered Species Act process that will determine whether or not the spotted owl is threatened or endangered.

135 Cong. Rec. H6507 (daily ed. Oct. 3, 1989). A proposal to list the spotted owl as a threatened species under ESA was pending at the time Section 318 was enacted. 54 Fed. Reg. 26666 (June 23, 1989).

Congress' explicit disavowal of any intent to amend the Endangered Species Act demonstrates its view that without that specific disclaimer the ESA would have been amended by the enactment of Section 318. Thus, Congress clearly understood that Section 318 ***did*** amend or repeal the specific environmental laws applicable to spotted owls that ***were*** the basis of the claims in *Seattle Audubon Society* and *Portland Audubon Society*. Representative Vento of Minnesota expressed this understanding clearly:

> The fact is the existing laws do not work. We have ended up in a quagmire of court cases and a stalemate that had resulted in severe economic and environmental problems in the Pacific Northwest.
>
> This measure is a reasoned and balanced approach that moves forward to free up and provide some relief in terms of the economy plus a policy path that will be workable for the near future. . . .
>
> . . . The existing laws, all well intended have all resulted in gridlock. We as a Congress must attempt to craft modifications that will prevent this in the future. The Interior appropriations effort is a start -- a good outcome under tough circumstances.

135 Cong. Rec. H6509 (daily ed. Oct. 3, 1989). Representative Vento was one of the 100 representatives who signed the letter attached as Appendix B to the respondents' brief that they claim supports their interpretation of congressional intent. Yet plainly Representative Vento understood that the existing laws *were* being modified by Section 318 as enacted by Congress.

Legislative history analysis aside, the point is that Congress intended Section 318 to work. If, as SAS contends, Congress meant to leave in place the very laws that had created the timber supply crisis in the first place, it would not have bothered to enact a Section 318 at all. Under SAS' theory of congressional intent, Congress intended the courts to be able to continue to apply in fiscal year 1990 all the same laws they had used in fiscal year 1989 to disrupt the federal timber supply. The existing injunction would not have been lifted, the "cease fire" would not have occurred, the "1-year breathing space"

would not have been granted and the "stalemate" would not have ended. SAS asks this court to believe that Congress went through an elaborate charade to enact a statute that would accomplish absolutely nothing. The court must reject this unwarranted construct of irrational congressional intent.

SAS offers three arguments to support its contention that Congress intended to act in this irrational manner. None of these arguments has any merit.

1. First, SAS relies on a sentence of the Conference Report on Section 318 stating: "This section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities." H. R. Conf. Rep. No. 264 at 89.

Since, as noted above, the ESA was not a basis for any claim in *Seattle Audubon Society* or *Portland Audubon Society*, the reference to that law has no bearing on this case at all. SAS' apparent reliance is on the phrase "or other environmental laws" in the quoted passage. This phrase sheds no light on Congress' intent for at least four reasons:

a. There is no explanation of which "other environmental laws" the Committee is referring to; thus, it is impossible to say whether the reference is to the laws invoked in *Seattle Audubon Society* and *Portland Audubon Society*.

b. In fact, many "other environmental laws" remained fully in effect and were in no way altered by Section 318. These include the Clean Water Act, the Clean Air Act, the Wild and Scenic Rivers Act, and many others which have no bearing on wildlife protection.

c. Even as to the specific group of environmental laws invoked in *Seattle Audubon Society* and *Portland Audubon Society*, all of them remained in effect ***except with regard to***

northern spotted owls. Thus, for example, under Section 318 NEPA, NFMA and MBTA would apply with regard to other wildlife species and other non-wildlife environmental issues applicable to management of federal forests in the Pacific Northwest. The district court in Oregon so held in *National Wildlife Fed'n v. United States Forest Service*, Civil No. 83-1153-LE (March 5, 1990), App. A hereto at 11a-12a.

d. The sentence's reference to the application of environmental laws to "Forest Service and BLM ***management activities***" does not apply to the (b)(3) and (b)(5) guidelines because implementing those non-discretionary statutory guidelines does not constitute a "management activity."

2. SAS' second argument is that the change of language between the Senate version of Section 318 and the version passed by Congress reveals an intent not to repeal or amend any existing environmental law. In support of this argument they offer a letter signed by members of Congress. Respondents' Brief, App. B. This letter fails to make the point for which it is cited by SAS. The letter says nothing about amending or not amending existing environmental laws. Rather, it deals with the availability of "judicial remedies," Respondents' Brief, App. 8a, 9a, and the "insulation of agency activities." *Id.* at 9a. Nothing in the letter indicates that its authors objected to the temporary amendment of the underlying existing laws. Representative Vento, one of the signers, clearly did not object to amending the existing laws. 135 Cong. Rec. H6509 (daily ed. Oct. 3, 1989).

There were no (b)(3) or (b)(5) guidelines set out in the Senate version of Section 318. It merely directed the agencies to sell timber "notwithstanding" the laws invoked in *Seattle Audubon Society* and *Portland Audubon Society*. The enacted version of Section 318 became far more specific and substantive by enacting the detailed (b)(3) and (b)(5) guidelines. Nothing in the congressional letter even remotely suggests that its

authors intended to make the subsequently-enacted version of Section 318 meaningless by leaving the conflicting environmental laws in place. To the contrary, adoption of the (b)(3) and (b)(5) guidelines shows more clearly in the enacted version than in the Senate version that Congress did not intend the existing laws to frustrate the specific statutory purposes of Section 318.

3. Third, SAS claims that the government had once interpreted Section 318 to allow NEPA, NFMA and MBTA to remain in effect with regard to spotted owl management. Respondents' Brief at 41-42. The record of the two cited cases, *Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, and *Gifford Pinchot Alliance v. Butruille*, 752 F. Supp. 967, plainly reveals the contrary. In those two cases the Forest Service argued and the courts ruled that Section 318 did not bar application of the ***ESA*** and of ***non-spotted owl*** environmental laws. *Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. at 1079-81; *Gifford Pinchot Alliance v. Butruille*, 752 F. Supp. at 972. The Forest Service has never argued to any court that NEPA, NFMA and MBTA applied to its spotted owl management during fiscal year 1990.

Thus there is no basis whatever to conclude, as SAS is forced to contend, that Congress intended to leave in place the statutes that had caused the regional timber supply crisis Section 318 was enacted to resolve.

CONCLUSION

In 1989 the courts created a crisis in the timber economy of the Pacific Northwest. Through the process of democratic government, Congress responded to this crisis by enacting legislation to resolve the crisis for fiscal year 1990. The decision below nullifies the democratically determined will of Congress. If there is a separation of powers violation in this case it has been committed by the decision below, which employed

plainly erroneous constitutional analysis to defeat the will of Congress as expressed in legislation which violates no provision of the Constitution.

The judgment of the Court of Appeals should be reversed.

Dated this 13th day of November, 1991.

Respectfully submitted,

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APPENDIX TO REPLY BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,	)	
	)	Civil No. 83-1153-LE
Plaintiffs,	)	
v.	)	
UNITED STATES FOREST SERVICE, et al.,	)	
	)	OPINION
Defendants,	)	
and	)	
DAVIDSON INDUSTRIES, INC., et al.,	)	
Defendants-Intervenors.	)	

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MARSH, Judge.

On August 6, 1984, this court entered judgment enjoining timber sales in the Mapleton Ranger District of the Siuslaw National Forest ("Mapleton District") pending the Forest Service's compliance with the National Environmental Policy Act. At issue before me now is the motion of defendant United States Forest Service *et al.* ("federal defendants") to modify the Amended Judgment of August 6, 1984 and plaintiff Siuslaw Task Force's cross-motion to modify this judgment. For the reasons set forth below, I grant both the federal defendants' and plaintiff Siuslaw Task Force's motions to modify.

FACTS

The Mapleton District is comprised of approximately 200,000 acres in the center of Oregon's coast range. As this court previously found, the District is "particularly susceptible to soil erosion" and this erosion has "dramatically increased" as a result of road building and timber harvesting. *National Wildlife Federation v. United States Forest Service*, 592 F. Supp. 931, 934 (D. Or. 1984), *as amended*, 801 F.2d 361 (9th Cir. 1986).

In 1982, the Forest Service issued a Seven Year Action Plan for the Mapleton District "proposing to harvest, primarily by clearcutting, approximately 100 million board feet a year."

National Wildlife Federation, 592 F. Supp. at 936. In 1983, plaintiffs brought this action for injunctive relief contending that the Seven Year Action Plan violated the National Forest Management Act, 16 U.S.C. § 1600 *et seq.*, the Multiple-Use Sustained Yield Act, 16 U.S.C. §§ 528-531, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4361.

The court found that the Forest Service's failure to prepare an environmental impact statement for the Seven Year Action Plan violated NEPA because the proposed timber sales constituted "major Federal actions significantly affecting the quality of the human environment" under 42 U.S.C. § 4332(2)(c). *National Wildlife Federation*, 592 F. Supp. at 940. Accordingly, the court enjoined the Forest Service from offering for sale any timber in the Mapleton District, with very limited exceptions, until the federal defendants submit to the court a final environmental impact statement.

Subsequent to the issuance of this injunction, Congress has twice legislated to limit the scope of the court's Mapleton District injunction. In 1985, Congress enacted legislation which authorized the Forest Service to resell certain timber sales from the Mapleton District that had previously been sold but returned to the Forest Service. Supplemental Appropriations Act, 99 Stat. 293, 340 (Aug. 15, 1985). The Act provided that such timber could be resold "notwithstanding any other provision of law, and notwithstanding the injunctions issued in National Wildlife Federation et al. v. United States Forest Service et al., 593 F. Supp. 931 (D. ORE. 1984) and in No. 84-4272 (9th Cir., March 6, 1985)." Supplemental Appropriations Act, 99 Stat. 293, 340. The Act further provided that "[a]ny decision of the Secretary of Agriculture to resell such timber shall not be subject to judicial review." *Id.*

Based on the 1985 Act and upon motion by the federal defendants, on January 3, 1986 the court modified the Amended Judgment by adding the following paragraph:

> 9. Paragraph 1-8 of the Amended Judgment, and the injunction therein, shall not apply to the resale or resale as modified, pursuant to Public Law No. 99-88, 99 Stat. 293, 340 (August 15, 1985), of timber sales that are returned to the federal defendants pursuant to the Federal Timber Contract Payment Modification Act, 16 U.S.C.A § 628, or which are defaulted.

In 1988, Congress once again acted to limit the scope of the Mapleton District injunction. The 1988 legislation authorized the Forest Service to sell up to 90 million board feet of timber in the Mapleton District in the Fiscal Year 1989 "notwithstanding the injunction issued pursuant to the judgment in the National Wildlife Federation, et al., v. United States Forest Service, et al. (592 F. Supp. 981 (D. Ore. 1984), as modified by 801 F. 2d 360 (9th Cir. 1986))." Department of Interior Appropriations Act, Public Law No. 100-446, § 321 (Sept. 27, 1988). Section 321 provided that

> [f]or the purposes only of selling timber pursuant to this section . . . the Secretary shall utilize the Siuslaw National Forest draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986 as if they were the final forest plan and environmental impact statement.

Section 321 specifically provided that for the purpose of this section, this draft statement ". . . shall be treated as satisfying all requirements of the National Environmental Policy Act of 1969 . . . and shall not be subject to administrative or judicial review" for noncompliance with NEPA. Section 321 expired September 30, 1989.

Based on the 1988 Act and upon motion by the federal defendants, on November 30, 1988 the court modified the Amended Judgment by adding the following paragraph:

10. Paragraphs 1-8 of this Amended Judgment, and the injunction therein, shall not apply to timber sales on the Mapleton Ranger District during Fiscal Year 1989, of up to 90 million board feet of net merchantable timber, offered pursuant to Public Law No. 100-446 (Sept. 27, 1988), Section 321.

The issue before me now is whether Congress has similarly exempted 1990 timber sales from the Mapleton District injunction through its enactment of § 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Public Law No. 101-121, 103 Stat. 701, 7455-50 *[sic]* (1989).

DISCUSSION

Both parties agree that § 318 of the 1989 Appropriations Act modifies the Amended Judgment in this action by allowing timber sales in the Mapleton District which were released by agreement between the parties pursuant to § 318(f)(1).[1]

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[1] Section 318(f)(1) provides that "[n]ot later than two days after enactment of this Act, the Forest Service shall submit to plaintiffs in the captioned case Seattle Audubon Society et al. v. F. Dale Robertson Civil No. 89-160, a list of sales which had been prepared for offer in fiscal year 1989 and which contain at least 40 acres of suitable spotted owl habitat. Not later than fourteen days after receipt of such list, plaintiffs . . . may enter into an agreement with the Forest Service releasing for sale not less than one billion one hundred million board feet of net merchantable timber . . . Such timber sales selected shall not be subject to further judicial review by a court of the United States." Pursuant to § 318(f)(1), certain

(continued...)

The parties disagree, however, as to whether § 318 acts to release other timber sales in the Mapleton District. Defendants argue that § 318 modifies the Amended Judgment by providing that the injunction does not apply in 1990 to proportionately allowed timber sales in the Mapleton District that are consistent with the preferred alternative of the Siuslaw National Forest's draft land and resource management plan and accompanying draft environmental impact statement. Plaintiff Siuslaw Task Force contends that § 318 does not modify the Amended Judgment in this manner because § 318 does not relieve the Forest Service of its obligation under NEPA to prepare a final environmental impact statement for the Mapleton District.

Section 318(a)(1) of the 1989 Appropriations Act provides that

> [t]he Forest Service shall offer, notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984 (16 U.S.C. § 618(a)(5)(c)), an aggregate timber sale level of seven billion seven hundred million board feet of new merchantable timber from the national forests of Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with existing land and resource management plans or land and resource management plans as ap-

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[1] (...continued)
environmental groups and the Forest Service reached agreement to release a number of timber sales including six sales on the Mapleton District. Plaintiff concedes that Congress has expressly directed that these six sales go forward despite the scope of the Amended Judgment in this action because, unlike § 318(a)(1), agreements entered into pursuant to § 318(f)(1) are not subject to judicial review.

> proved *except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, such sales shall be consistent with the preferred alternative of the draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986, pending approval of a final land and resource management plan for the Siuslaw National Forest*: *Provided*, That of the seven billion seven hundred million board foot aggregate timber sale level for fiscal years 1989 and 1990, timber sales offered from the thirteen national forests in Oregon and Washington known to contain spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of five billion eight hundred million board feet of net merchantable timber: *Provided further*, That the sales volume shall be distributed in the same proportion between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volume for fiscal years 1986 through 1988.

(Emphasis added).

Defendants argue that because § 318(a)(1) lists the Mapleton District as part of its total annual timber harvest for the Fiscal Year 1990, this section must be interpreted as a replacement of the 1988 Appropriations Act provision which gave rise to this court's order of November 29, 1988 amending the scope of the Mapleton District injunction. Defendants contend that § 318(a)(1) lifts the injunction in this case for an additional year so as to allow timber sales in the Mapleton District to proceed notwithstanding defendants' failure to complete a final environmental impact statement.

Defendants also argue that § 318 modifies the Amended Judgment to allow 1990 timber sales to proceed because § 318 removes the legal basis for the Amended Judgment. Defendants argue that this is so because § 318 precludes the court from determining whether timber sales covered by § 318 are in

violation of NEPA. Defendants argue that because NEPA violations were the basis for the injunction in this case, the Mapleton District injunction must be suspended for 1990. In support of this position, defendants rely on the following language from § 318(b)(5)(A):

> Congress hereby determines and directs that management of areas according to subsections (b)(3) . . . of this section on the thirteen national forests in Oregon and Washington . . . known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) . . . of this section shall not be subject to judicial review by any court of the United States.

Subsection (b)(3) in turn provides that no timber sales offered from the thirteen national forests in Oregon and Washington known to contain spotted owls may occur within Spotted Owl Habitat Areas ("SOHA") "identified pursuant to the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide - Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection." Subsection (b)(3) sets forth modified SOHA sizes for specified national forests in Oregon and Washington.

I find that § 318(a)(1) modifies the injunction in this case by allowing timber sales to proceed in the Mapleton District as part of the mandated sale of seven billion seven hundred million board feet provided that such sales are consistent with the preferred alternative of the draft land and resource man-

agement plan and accompanying draft environmental impact statement dated October 1, 1986.

Plaintiff's contention that § 318 is not applicable to this case because the purpose of this section was limited merely to problems associated with the northern spotted owl is not supported by the record. The purpose behind § 318 was an attempt "to balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted own *and* significant old growth forest stands." Conference Report No. 101-264 at 87 (Oct. 2, 1989)(emphasis added). As the Conference Committee explained, § 318 was a legislative response to court challenges that "have raised serious concerns about the adequacy of planned actions of the agencies with regard to managing habitat for the northern spotted owl *and* minimizing fragmentation of old growth stands." Conference Report at 87 (emphasis added). "The net result of the legislation, after a prolonged debate in Congress, is to set aside, for one year, certain requirements of the environmental laws so that logging may go forward in old-growth national areas that contain spotted owl habitat." *Seattle Audubon Society, et al. v. Robertson et al.*, Civ. No. 89-160-WD, slip. op. at 1-2 (W.D. Wash. November 14, 1989). This goal is accomplished through the establishment of interim guidelines for the management of spotted owl habitat and the removal for fiscal year 1990 of "the sufficiency or insufficiency of those standards as a reason for injunctive relief." Conference Report at 87.

In contrast to both the 1985 and 1988 Appropriations Acts which altered or suspended the Mapleton District injunction, § 318(a)(1) does not mention this action by name or direct that timber be sold "notwithstanding the injunction issued" by this court. However, § 318(a)(1) does set forth a standard for these sales which is at variance with the standard required in the Amended Judgment in this case. Accordingly, I find that § 318(a)(1) presents a "clear and unavoidable conflict" in statutory authority between that section and the requirements

of NEPA upon which the Amended Judgment in this case was based. *See California v. Block*, 690 F.2d 753 (9th Cir. 1982)(holding that federal agencies must comply with NEPA "to the fullest extent possible unless there if *[sic]* a 'clear and unavoidable conflict in statutory authority.'" *Id.* at 775 quoting *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976)). The reference to the Mapleton District in § 318(a)(1)'s directive that seven billion seven hundred million board feet be sold in Oregon and Washington national forests in Fiscal Years 1990 clearly shows that Congress intended that a portion of the aggregate timber sales take place in the Mapleton District. I find that the only plausible explanation for the inclusion of § 318(a)(1)'s provision relating to the Mapleton Ranger District of the Siuslaw National Forest is that Congress recognized that no final environmental statement exists for the Mapleton District. By establishing an alternative standard for assessing proposed timber sales in the Mapleton District, Congress thereby directed that these timber sales proceed notwithstanding the District's failure to complete a final environmental statement and consequently notwithstanding the injunction in this case which was based solely on the District's failure to complete a final environmental statement.

I reject defendants' argument that the Amended Judgment in this case is modified because § 318(b)(6)(A) nullifies all NEPA violations for the Fiscal Year 1990. Section 318(b)(6)(A)'s reference to the "statutory requirements that are the basis for the [listed] consolidated cases" is not synonymous with *any* alleged violation of NEPA. Rather, the reference to statutory requirements relates to the specific NEPA violations which were the basis for the listed cases. In the cases listed in § 318(b)(6)(A), such as *Seattle Audubon Society v. F. Dale Robertson*, Civil No. 89-160, the alleged NEPA violations related to the Forest Service's failure to adequately disclose and assess environmental consequences to the spotted owl in the Forest Service's Environmental Impact Statement for its Pacific Northwest Regional Guide - Spotted Owl Guidelines. Section

318 abates such alleged violations of NEPA for the Fiscal Year 1990 insofar as they relate to sales covered by § 318. Accordingly, my finding that Congress intended timber sales to proceed on the Mapleton District notwithstanding the permanent injunction in this action is not based on any alleged repeal of NEPA but rather Congress' directive that Mapleton District timber sales proceed provided that the preferred alternative of the draft land and resource management plan is complied with. Thus, contrary to plaintiff's contention, the presumption disfavoring repeals by implication does not apply. *See e.g. United States v. Fausto*, 108 S.Ct. 668, 676 (1988); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978); *Rembold v. Pacific First Federal Savings Bank*, 798 F.2d 1307, 1310 (9th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987).

CONCLUSION

For the reasons set forth above, I grant defendants' motion to modify the Amended Judgment of August 6, 1984 (# 238). The Amended Judgment of August 6, 1984 in this case, as modified by Order dated January 3, 1986, appellate order dated September 30, 1986 (801 F.2d 360), and Order dated November 29, 1988, is hereby further modified to add the following paragraph:

> 11. Paragraphs 1 through 8 of this Amended Judgment, and the injunction therein, shall not apply to timber sales on the Mapleton Ranger District during Fiscal Year 1990 that are consistent with the preferred alternative of the Siuslaw National Forest's draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986, or when approved by the Regional Forester, the Siuslaw's National Forest's final land and resource management plan and accompanying final environmental impact statement.

Plaintiff's motion to modify the Amended Judgment by striking paragraph 10 (# 241) is also granted on the ground that the statutory provision on which the modifications contained in paragraph 10 were based is no longer in effect.

DATED this 5th day of March, 1990.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge